REMARKS

The official action of 30 September 2010 has been carefully considered and reconsideration of the application as amended is respectfully requested.

Claims 1-12 and 21-32 have been canceled and rewritten as new claims 33-55. Claims 33-55 contain the recitations in the canceled claims, but have been rewritten for clarity, including to overcome the rejection under 35 USC 112, second paragraph, and to make clear that the formation of the first material mixture into a creamy product is in a stirring step that is separate from the grinding step. The new claims also contain the additional recitations that: (1) the oil or fat is selected from the Markush group described in the specification at page 8, lines 1-5; and (2) the grinding is carried out by a refiner as described in the specification at, for example, page 12, lines 9-10.

New claims 56 and 57 have been added more completely to define the subject matter which Applicants regard as their invention. Support for the recitations in claim 56 appear in the specification as filed at, for example, page 12, lines 11-14. Support for the recitations in claim 57 appear in the specification as filed at, for example, page 11, lines 31-33.

All claims as amended are respectfully believed to be free of the indefiniteness rejection appearing at page 2 of the official action, and are otherwise believed to be sufficiently definite to satisfy the provisions of 35 USC 112, second paragraph.

The claims stand rejected under 35 USC 103(a) as allegedly being unpatentable over Kim in view of Avera or over this combination of references further in view of Titcomb. Applicants respectfully traverse these rejections.

First, Applicants respectfully note that, in the invention defined by all claims of record, a first material mixture comprising a protein component, an oil or fat component and a saccharide component is first finely ground, and then, in a subsequent step, the finely ground mixture is stirred **with heating in the claimed range** to form a **creamy** primary product. Indeed, it is critical for the claimed invention that a creamy primary product is formed in a preliminary step. In this connection, it should be understood that, upon formation of the creamy primary product, components other than the oil or fat component would be able to be dispersed in the oil or fat component.

The Examiner has not pointed to anything in Kim that describes (a) stirring with heating of the components in the claimed temperature range, or (b) the formation of a creamy primary product. Rather, the Examiner appears to contend that the grinding described in Kim would**inherently** result in these features. For reasons discussed next, Applicants respectfully disagree and submit that the Examiner has not met the initial USPTO burden of providing facts to establish that either of these limitations are inherently present in Kim. See MPEP 2142 ("The examiner bears the initial burden of factually supporting any prima facie conclusion of obviousness.").

Kim teaches starting materials of hazelnuts and lactitol monohydrate and describes that the grinding operation performed therein should be carried out graduallyin order to avoid the liberation of oil from the nuts as much as possible (see Kim at column 3, lines 59-65). Thus, Kim's ground mixture would have little or no oil from the hazelnuts described as the starting material in Kim. Moreover, as can be seen from Kim at column 2, lines 31-32, lactitol monohydrate is a non-hygroscopic crystalline product (not, e.g., a solution). Accordingly, one of skill in the art would expect that the ground mixture of these products as described in Kim would be a powder, not a creamy product. The Examiner certainly has not established facts required to show that it would in order to meet the USPTO's initial burden.

Moreover, the claimed invention requires separate steps of (1) grinding, and (2) stirring with heating within the claimed range, and Kim cannot meet these recitations in any event. The grinding step (a) in Kim (column 3, lines 61-65) is separate and distinct from the whipping step (b) in Kim (column 3, lines 66-68). There is nothing in Kim to show or suggest that**the whipping step (b)** is conducted with heating in the claimed temperature range. Moreover, there is nothing to show or suggest that the grinding step (a) in Kim results in heating within the claimed temperature range.

The Examiner's attempt to rely upon the secondary reference, Avera, to meet the claimed temperature range is respectfully insufficient. In Avera, a high friction grinding operation that can give rise to temperatures of 340 to 400°C (171 to 204°C) is distinguished from a normal "grinding" operation (Avera at Fig. 3). But, there is nothing in either of the references that would show or suggest what the temperature range would be from the friction of grinding hazelnuts or coffee beans as in Kim. The Examiner's attempt to intuit that somehow the temperature of the grinding would result in a temperature in the range of 40-60°C (and not above or below) is respectfully conjecture that is insufficient to support the rejection. See MPEP 2144.02 ("However, when an examiner relies on a scientific theory,**evidentiary** support for the existence and meaning of that theory must be provided."). Moreover, even assuming that there were evidentiary support for the Examiner's contention, the rejection would still fail in that there is nothing in any of the references to show or suggest heating within the claimed temperature range in a separate and subsequent stirring step.

In addition to the above, Applicants respectfully note that the claims are distinguishable from the cited art by virtue of the claim recitation requiring that the grinding be carried out in a refiner. As would be known to one of skill in the art, a refiner is used, for example, in confectionery manufacture to refine sugar particles in materials, such as chocolates, that are sensitive to temperature. One of skill in the art would understand the recitation that a refiner is used for the claimed grinding operation to exclude high friction grinding as in the cited primary reference.

In view of the above, Applicants respectfully submit that the Examiner has not met the initial USPTO burden of setting forth even a *prima facie* case of obviousness for the invention defined in any of the claims as amended. With particular respect to claim 55, Applicants respectfully submit that the claim is additionally distinguishable from the cited art insofar as the art does not show or suggest the addition of a fraction of the oil or fat component during the stirring step. With particular respect to claim 56, Applicants respectfully submit that the claim is additionally distinguishable from

the cited art insofar as the art does not show or suggest forming the first material mixture by separately providing and mixing three (3) components: a protein component, a fat or oil component and a saccharide component. Kim teaches the provision and grinding of two (2) components, e.g. hazelnuts and lactitol monohydrate.

For the above reasons, Applicants respectfully submit that all rejections and objections of record have been overcome and that the application is now in allowable form. An early notice of allowance is earnestly solicited and is believed to be fully warranted.

Please charge Account No.12-0425 for any fees which may be due by this paper.

Respectfully submitted,

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